In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1116

PETER BERATA AND ANDREW RUTTO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. II, 79a; Pet. App. 1a-3a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1965. A petition for rehearing was denied on April 14, 1965. The petition for a writ of certiorari was filed on April 30, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were deprived of a fair trial because government counsel delivered grand jury testimony of a witness to the trial court without commenting on minor inconsistencies.

2. Whether the trial court's findings of fact were erroneous.

STATEMENT

Petitioners were convicted by the court, sitting without a jury, in the Southern District of New York on two substantive counts and a conspiracy count charging violation of the narcotics laws, 21 U.S.C. 173 and 174 (R. I, 7a-10a, 27a). Petitioner Berata was sentenced to imprisonment for concurrent periods of seven years on each of the two substantive counts and five years on the conspiracy count (R. I, 30a-31a). Petitioner Rutto was sentenced to imprisonment for a period of six years on each substantive count and five years on the conspiracy count, to run concurrently (R. I, 28a-29a). The court of appeals affirmed the judgment *per curiam* (R. II, 79a).

The evidence showed that on November 7, 1962, an informant introduced narcotics agent Cantu to co-defendant Richardson at Richardson's TV repair shop (R. II, 3a, 22a). Richardson asked Cantu if he wanted "some of the stuff" and stated that he could get him a "piece" for $475 (R. II, 4a). On November 8, 1962, Cantu gave Richardson $475 (R. II, 6a) which Richardson returned the next day, tell-

ing Cantu he was unable to see his connection (R. II, 7a-8a). On November 13, 1962 agent Cantu again gave Richardson $475 to get "one piece of stuff" (R. II, 9a). Richardson made delivery later that day (R. II, 10a-11a).

Subsequently, on December 6, 1962, agent Cantu gave Richardson $490 for another ounce of heroin (R. II, 13a). Richardson was seen going to the C & A Paint Shop, where he talked with petitioner Rutto, gave Rutto some money and received in return a brown paper bag (R. II, 25a). Richardson then left the paint shop and delivered a brown paper bag containing heroin to agent Cantu (R. II, 14a-15a, 33a-34a). About 7:00 p.m. petitioner Rutto met petitioner Berata in a bar several blocks from the C & A Paint Shop (R. II, 26a-27a, 36a-37a), and they engaged in the following conversation (R. II, 37a):

> Mr. Berata asked Rutto, "How did everything go?" Mr. Rutto said, "Everything went down all right. The guy got the piece and he liked the goods. He gave me the four bills * * *. Can you imagine he tried to chisel me down. He told me he only makes $90 on each piece."
>
> Mr. Berata then said "This guy gets no more goods unless he takes five or better at a time. If he takes five or more we will let him have it for $350 a piece."

Petitioner Rutto then gave Berata a sum of money (R. II, 37a).

On December 12, 1962 agent Cantu gave Richardson $980 for two more ounces of "stuff" (R. II, 17a-18a). Thereafter, in response to a radio call (R. II,

38a), narcotics agents kept the C & A Paint Shop under surveillance and followed petitioner Rutto along a circuitous route to a meeting with Richardson (R. II, 30a-31a, 38a-39a). At this meeting, Richardson alighted from his vehicle, walked across the street to Rutto, who was sitting in the car, put his head, shoulders and hands inside the driver's side for about 30 seconds and then walked directly back to his automobile (R. II, 31a, 39a). Richardson, after making a telephone call, met agent Cantu in front of the TV shop and delivered a brown paper sack containing heroin (R. II, 18a-19a, 31a-32a). In the meantime, Rutto returned to the bar in the vicinity of the paint shop, where he met Berata and had the following conversation (R. II, 39a-40a):

> Berata asked Rutto again, "How did everything go?"
>
> Rutto said, "I don't know. There was a little —I had someone—I think I had someone follow me. I have noticed cars sitting around the paint store yesterday, and I thought some cars were following me today, but I tried to shake them * * * but I gave the guy the two pieces and I got the nine bills."

On January 7, 1963, agent Cantu told Richardson he wanted 18 ounces of stuff (R. II, 19a-20a). Richardson made a telephone call, asked for "Shorty" and said "he needed 18 cans of paint" (R. II, 20a). After the telephone call Richardson told agent Cantu to come back later. The next day, Richardson told Cantu that "there was something going wrong" and that

he would not be able to help him any more (R. II, 21a).

ARGUMENT

1. Petitioners contend in this Court (as they did on petition for rehearing in the court of appeals) that government counsel acted improperly in failing to call to the attention of the trial court inconsistencies between grand jury and trial testimony of a witness (Pet. 3-4). This contention is without merit. The record shows that counsel gave the grand jury testimony of agent Holborow to the court, which was sitting as both judge and jury, and stipulated that this witness was the only prosecution witness to testify before the grand jury (R. I, 11a). At the close of the testimony by agent Holborow, the court stated (R. I, 11a):

> I have read the grand jury testimony and I have also followed it during the course of the examination and I find no material variance in it. I think it has a lot of hearsay, but no material variance. I direct that it be returned to the district attorney.

Two leading questions in the grand jury minutes referred to the date of December 5, 1962 instead of December 6, 1962, and agent Holborow answered "yes sir" to both. At trial, agent Holborow was one of at least five narcotics agents who testified about their roles in observing the events of December 6 and 12. The testimony of all five agents as to dates was consistent. Since the court had read the grand jury

testimony and had followed it during Holborow's examination, government counsel had no reason to believe that the court's finding of "no material variance" was, in fact, a finding that there were no inconsistencies whatever or that no "oversight" had occurred. This case falls far short of the "suppression by the prosecution of evidence favorable to an accused" which is "material either to guilt or to punishment" contemplated in *Brady* v. *Maryland*, 373 U.S. 83, 87, on which petitioners rely.

2. Petitioners further assert that the trial court erroneously found that they were involved in a conspiracy with Richardson beginning in the middle of November 1962, and that Rutto had actual possession and Berata had constructive possession of narcotics as far back as the November 13 transaction between Richardson and agent Cantu (Pet. 5-8). While the testimony did not specifically link petitioners to the operation until December 6, 1962, the pattern or scheme of the transactions occurring in December made it reasonable for the trial court to conclude that petitioners provided the same service for Richardson on November 13, 1962. The assertion that the trial court was confused about the evidence is refuted by the record. Prior to its findings of fact, the court stated in a clear and detailed manner an accurate summary of all the evidence (R. I, 13a-23a). The findings, while perhaps broader than was necessary for decision, have not been shown to be erroneous.

In any event, the findings of fact as to the December 6 and 12 transactions (the two substantive counts) was supported by actual eyewitness testi-

mony of several narcotics agents. The court of appeals treated the findings regarding the November transaction as "at most mere surplusage," and it correctly held that the evidence was sufficient for conviction. (Pet. App. 2a-3a).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

JUNE 1965

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